FEDERAL HABEAS CORPUS AS A SOURCE OF NEW CONSTITUTIONAL REQUIREMENTS FOR STATE CRIMINAL PROCEDURE

MAURICE KELMAN*

The federal writ of habeas corpus has become virtually a sovereign remedy for state prisoners who seek to upset their convictions on constitutional grounds. Contrary to earlier practice, failure to observe state procedural requirements for presenting constitutional claims rarely is a bar to a federal habeas proceeding. The next major development may be a "federalization" and relaxation of many rules of state procedure, as a matter of fourteenth amendment interpretation.

It is a unique characteristic of American federalism that within each territorial jurisdiction there exists a dual system of courts, each having a part in enforcing the laws of the other authority. Federal courts apply state law in the exercise of their diversity and pendent jurisdictions, and state courts apply federal law, including the United States Constitution, in a kaleidoscopic variety of cases. Not only do local courts apply national law and vice versa, but as a general matter litigation begins and ends in the same system of courts. When a question of state law arises in a federal court action, its determination, with some exceptions,[1] is in the hands of that tribunal and there is no opportunity for review by a state court, even though it is conceded that the state appellate courts speak with ultimate authority on matters of state law. Similarly, when an issue of federal law arises in state court litigation, its final resolution more often than not is left to the local courts. In many circumstances, it is true, there can be review in the United States Supreme Court,[2] but attempts to secure such review are episodic and success is rare. Too, under certain conditions state court litigation involving federal questions can be removed to the federal district courts.[3] But the basic configuration of our judicial federalism has been as we have described it: unicameral litigation notwithstanding overlapping jurisdiction.

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* Associate Professor of Law, The Ohio State University College of Law.

1 Where unconstrued state law is challenged on federal constitutional grounds, the "abstention" doctrine furnishes a means for obtaining clarification from the state court. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941). This device is not generally available in diversity-of-citizenship litigation. *Compare* Meredith v. City of Winter Haven, 320 U.S. 228 (1943), *with* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959).

2 28 U.S.C. § 1257 (1966).

3 See generally Wright, Federal Courts 110-26 (1963).

However, the proposition that state court determinations of federal rights usually go unreviewed by federal courts needs to be qualified drastically in reference to state criminal litigation. Since the Hughes era, and with frenetic energy in the past several years, the Supreme Court has greatly expanded the fourteenth amendment rights of persons charged and tried under state criminal laws. Pari passu with this catalogue of newly recognized constitutional protections has been an enlargement of the federal writ of habeas corpus as a post-conviction process available to state prisoners who raise claims of violation of their federal rights by the police, prosecutor, or defense counsel, or by the rulings of the trial or appellate courts of the state.

It is clear that the Constitution does not require every federal question, including those raised by state prisoners, to be heard at some stage of litigation in a federal court.[4] Equally plain is the proposition that nothing in the Constitution inhibits Congress from providing a federal forum if it so chooses; that is to say, from extending the jurisdiction of federal courts to the outermost limits of Article III.

Relief under federal habeas corpus is thus a matter of statutory provision. But some statutes fashion a government in ways as fundamental as constitutions. The Habeas Corpus Act, virtually unmodified since its adoption in 1867, is such a statute.[5] The cases under it rank with *Erie R.R. v. Tompkins*[6] (an interpretation of the Rules of Decision Act)[7] as among the most profoundly consequential of the Court's decisions.

This article is concerned with how and why the lower federal courts have been projected pell-mell into the administration of state criminal justice, and what a federal forum of regular resort means for state procedures which are less hospitable to federal claims than is habeas itself.

I. Questions Triable on Habeas

In its most limited use as a post-conviction process, federal habeas corpus questions the "jurisdiction" of the court or courts by whose sentence the prisoner is held but does not inquire into allegations of mere "error." For over a century that is how habeas as a remedy for *federal* convicts was understood. In perhaps the earliest Supreme Court expression on the subject, *Ex parte Watkins*,[8] it was said: "An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has

[4] *But see* Fay v. Noia, 372 U.S. 391, 406 (1963).

[5] 28 U.S.C. § 2241 (1959).

[6] 304 U.S. 64 (1938).

[7] 28 U.S.C. § 1652 (1966).

[8] 28 U.S. (3 Pet.) 193, 203 (1830).

general jurisdiction of the subject, although it should be erroneous." Words to the same effect have been used by the Court on countless subsequent occasions, and as recently as 1947 it was held that only errors that "cross the jurisdictional line" are cognizable on habeas.[9] The meaning of "jurisdiction" in criminal proceedings is, at best, unclear. Were it strictly coextensive with the power to make decisions, the occasions would be negligible when a criminal court would be found to lack power over the person of the accused or competence to try violations of the penal law. But during the *Watkins* century habeas was used successfully, for example, to challenge the constitutionality of the statute creating an offense[10] and the legality of sentence imposed[11]—important questions to be sure, but matters having more to do with propriety than power of decision. Nevertheless, a claimed violation of the self-incrimination provisions of the fifth amendment, which also is an important matter, was dismissed as non-jurisdictional and hence unsuitable for habeas.[12] A classification of questions held to be jurisdictional once was attempted by Mr. Justice Frankfurter,[13] but his effort tended rather to accentuate than reduce the tohubohu of past decisions.

Perhaps the most enterprising interpretations of the cases of the habeas-tests-only-jurisdiction era are those recently advanced by Justices Brennan and Harlan in *Fay v. Noia*.[14] That they are in total conflict is only to say that legal history, no less than general history, is a creative art.[15] Mr. Justice Brennan suggests that the Court's actions, far more aggressive than the *Watkins* formula would indicate, confirm that habeas always was available for the determination of serious constitutional claims. The apparent exceptions, such as the self-incrimination case just mentioned, are marked off as situations in which the Court regarded the substantive claim as near frivolous and preferred to rest rejection on lack of jurisdiction. From his reading of the case law, Justice Brennan draws positive support for the proposition that "restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to

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9 Sunal v. Large, 332 U.S. 174, 179 (1947).

10 *Ex parte* Siebold, 100 U.S. 371 (1879).

11 *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

12 Matter of Moran, 203 U.S. 96 (1906).

13 Sunal v. Large, *supra* note 9, at 185-87 (dissenting opinion).

14 372 U.S. 391 (1963).

15 *But see* Mayers, "The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian," 33 U. Chi. L. Rev. 31 (1965), and Oaks, "Legal History in the High Court Habeas Corpus," 64 Mich. L. Rev. 451 (1966), challenging Mr. Justice Brennan's historiography.

the conviction of a federal court of competent jurisdiction"[16]—a principle flatly at odds with the language of scores of decisions but nevertheless one which the Justice believes was inchoate in those same decisions. Mr. Justice Harlan, on the other hand, is content to take the jurisdictional limitation at face value. The anomalies, he concludes, are not evidence of a latent and wholly different principle of collateral review but merely manifestations of a natural desire to afford some kind of examination of federal criminal convictions at a time when there was no statutory provision for direct appeal.[17]

The early uses of federal habeas corpus as a remedy for *state* prisoners provide another fertile source of divergent interpretations. The 1867 statute in terms extended the writ to all persons held in custody "in violation of the Constitution or laws or treaties of the United States."[18] To the question whether the claimed violation of federal rights had to rise to jurisdictional magnitude, Justices Brennan and Harlan again offer conflicting analyses of the cases. Mr. Justice Brennan finds the jurisdictional limitation rejected by implication in the exhaustion-of-remedies cases, beginning with *Ex parte Royall*.[19] Those decisions introduced and developed the requirement that state prisoners must seek vindication of their federal rights through all available procedures in the state courts before resorting to the federal remedy of habeas. Such a doctrine, Mr. Justice Brennan argues, presupposes that after state remedies have been pursued the same issues are then open to decision in the federal court. And since the Court did not specifically restrict the class of federal claims for which exhaustion was required, it follows, so the argument goes, that no restrictions ever were intended. But there are other decisions, on which Mr. Justice Harlan relies for his thesis that the scope of habeas in the beginning did not go beyond jurisdictional defects in the state court proceedings. Among them are cases holding that claims of racial exclusion of jurors were not cognizable on habeas, even though the allegations presented meritorious federal issues for purposes of direct review.[20] In some of these cases, moreover, there are explicit *Watkins*-type statements about "jurisdiction."[21]

Frank v. Mangum,[22] decided in 1915, is universally considered a benchmark habeas decision. Whether it was a departure from former

16 372 U.S. 391, 409 (1963).
17 *Id.* at 450-51 (dissenting opinion).
18 *Supra* note 5.
19 117 U.S. 241 (1886).
20 *E.g.*, *In re* Wood, 140 U.S. 278 (1891).
21 See Andrews v. Swartz, 156 U.S. 272 (1895).
22 237 U.S. 309 (1915).

practice, however, provokes another Brennan-Harlan disagreement. The state prisoner in *Frank* had his federal claim (a charge that his trial had been mob-dominated and therefore no trial at all within the meaning of due process) considered, investigated, and rejected on the facts by the highest state court. The Supreme Court held that the latter determination accorded defendant his full measure of due process and that the same claim could not be renewed in federal habeas proceedings. This ruling obviously confounds Justice Brennan's view that the exhaustion requirement postponed, but never foreclosed, collateral review in the federal courts, while it is further support for Justice Harlan's contention that not every assertion of violated federal rights compelled inquiry on habeas. Nevertheless, it is important to note that the complaint in *Frank* was not of mere error or even of mere constitutional error. It was nothing less than an allegation that the defendant's trial was a lynching disguised as a legal proceeding. For a Court prepared to treat as jurisdictional such things as the constitutionality of the criminal charge, it would have been easy, and much more accurate in a technical sense, to say that Frank's claim did relate to the jurisdiction of the convicting court and, being based on the federal constitution, warranted consideration in the federal courts. Such in fact was the position taken in several cases after *Frank*.[23]

But to say that the federal question presented in *Frank v. Mangum* was of that limited albeit ill-defined class of questions traditionally subject to collateral federal review is not to say that the decision is indefensible. On the contrary, *Frank* has its defenders. One of them is Professor Paul Bator, in whose estimation *Frank* is a prime example of the sensible use of federal habeas corpus.[24] It is not the mere assertion of a federal claim, says Bator, which justifies a post-conviction proceeding before a federal judge; it is only the assertion of a federal claim which has not been adjudicated in a fair and adequate state court hearing. Put another way, traditional habeas practice involves an inquiry into the adequacy of the state process, and when that inquiry is concluded in favor of the state that is, and should be, the end of the matter. The argument is that the touchstone, "lack of jurisdiction," is another, perhaps more elliptic way of expressing the same thought, as is the companion phrase that habeas "will not be allowed to do service for an appeal." In these terms *Frank v. Mangum*

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[23] House v. Mayo, 324 U.S. 42 (1945) (coerced guilty plea); Mooney v. Holohan, 294 U.S. 103 (1935) (prosecutor's knowing use of perjured testimony); Moore v. Dempsey, 261 U.S. 86 (1923) (mob domination of trial).

[24] Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441, 486-87 (1963).

can be justified; for if the question for the federal court was not whether the prisoner had received a fair trial but whether his appeal on the issue of fair trial had itself been fairly heard and decided in the state supreme court, there is only one answer and the writ served its traditional function in providing that answer.

With the Bator analysis it is also possible to harmonize the post-*Frank* cases. For example, in *Moore v. Dempsey*,[25] where the federal habeas court did reach the merits of a claim of mob domination of the petitioner's trial, there appears to have been no meaningful examination of the claim in any prior state court proceeding. Accepting the Harlan-Bator understanding of the original practice on federal habeas corpus, one comes to the conclusion that collateral review performed a function quite different from and far more modest than appellate review. The writ assured only that federal claims would be heard fairly —if not in the state courts, then by default in a federal forum. The writ did not, however, serve as an instrument for the correction of errors committed in the context of fair judicial proceedings in the states; for that the remedy lay solely in a writ of error to the United States Supreme Court.

However one choses to read the cases of the nineteenth and early twentieth century, there is no doubt that the 1953 decision in *Brown v. Allen*[26] demolished *Ex parte Watkins*, *Frank v. Mangum*, and a host of other habeas landmarks. The Court held in *Brown* that it was proper, indeed mandatory, for the lower federal courts on habeas to pass on the merits of federal claims which the state courts had already considered, weighed, and rejected—not merely *some* federal questions, not only questions relating to the *jurisdiction* of the state courts, but any and all questions of federal law. The issues presented in Brown's case (coerced confession and racial discrimination in the selection of jurors) were not of the kind theretofore recognized as proper subjects for habeas. They were not jurisdictional, even in the untidiest use of the term,[27] and in addition they had been determined conscientiously and dispassionately both in the trial court and in the North Carolina Supreme Court.

If erroneous, those determinations were correctible by the process of direct review in the United States Supreme Court.[28] Of course Su-

[25] *Supra* note 23.

[26] 344 U.S. 443 (1953).

[27] See cases of racial exclusion from juries, *supra* notes 20 and 21. But for the view that the proceedings are fatally polluted when a coerced confession is introduced see note 53, *infra*, and accompanying text.

[28] Certiorari in fact had been requested and refused. Brown v. North Carolina, 341 U.S. 943 (1951). Such application was then a requisite step in exhaustion of "state"

preme Court review of anything is not easily obtained; the jurisdiction is almost entirely discretionary, the time and energies of the Justices are, it goes without saying, limited, and the criteria for selection of cases generally have little to do with the distress of a litigant. Moreover, the processing of criminal cases through the state courts does not always bring the federal issues into a focus sharp enough for the Supreme Court's unique purposes. A well-developed record, clear findings of fact, and thorough exploration of the issues in the courts below are weighty considerations even if they are not formal prerequisites to the granting of certiorari. This is as it should be in a court whose most important function is to pronounce the Law for the benefit of the nation primarily and for the contesting parties only incidentally.[29] Another consequence of its special role is that the Court will not necessarily hear all the federal claims raised in a single litigation but may limit its review to one question deemed more compelling or more timely than the others. This means that a decision adverse to the petitioner operates as an affirmance of the judgment below, despite the possibility that the judgment might, on plenary review, turn out to be infected with other reversible errors.[30]

Thus in the absence of collateral proceedings in lower federal courts, the fate of a state criminal defendant is likely to be entirely in the hands of the state judiciary. This, as was said at the outset, is the situation for many civil litigants who have federal claims to press. But to the Court in *Brown v. Allen* it was not an acceptable state of affairs when life or liberty are at stake nor, as the Court saw it, was it responsive to the will of Congress as expressed in the 1867 Act to limit the writ of habeas to a narrower range of questions than are cognizable on certiorari or appeal. In short, *Brown* equates habeas with direct review. If a state prisoner cannot interest the Supreme Court in hearing his claims, he can take them to the nearest federal district court, where a hearing is assured.

II. Effect of State Procedural Default

The petitioner in *Brown* pursued every avenue of redress in the state courts, and only then did he turn to the federal court. But suppose for one reason or another a habeas petitioner has omitted a state remedial step. What is the effect on his eligibility for habeas? An

remedies. *Ex parte* Hawk, 321 U.S. 114 (1944); Darr v. Burford, 339 U.S. 200 (1950), overruled in Fay v. Noia, 372 U.S. 391 (1963).

29 Hart, "The Time Chart of the Justices," 73 Harv. L. Rev. 84 (1959).

30 *Cf.* the limited grant of certiorari in Olmstead v. United States, 277 U.S. 438 (1928).

answer was supplied in *Daniels v. Allen*,[31] a companion case to *Brown* and identical save in one respect: Daniels' appeal from conviction had been dismissed by the state supreme court for late filing. The immediate question was whether Daniels had satisfied the requirement of exhaustion of state remedies—a requirement which originated, as we have noted, in nineteenth century cases and which was codified into the Habeas Act in 1948.[32] Did the requirement relate only to those state remedies open to a prisoner at the time of his federal proceeding (and for Daniels there were none) or did it include remedies formerly available but now time-barred? The Court held that state "remedies" meant past as well as present opportunities for relief from imprisonment. Daniels' botched appeal therefore cost him his right to federal habeas corpus.

The purpose of the exhaustion doctrine is understandable enough. There is no reason to presume that a prisoner inevitably will fail to secure redress in the state courts. If anything the presumption is just the reverse: that courts generally recognize meritorious claims when they are presented. Habeas, to be sure, exists for those cases in which error has not been corrected, but respect for the basic soundness of state processes—and considerations too of the federal courts' own volume of business—dictate that the writ be kept in reserve as a last resort. Furthermore, it would seem to be in the selfish interest of state prisoners to pursue as many avenues of redress as the law affords. The most they have to lose is time. Of course, to a prisoner time spent in jail means a great deal; and to those—probably their numbers are legion—who have no confidence in state court justice, the exhaustion requirement no doubt seems a perverse device for prolonging unjust detention. While a prisoner's Weltansicht obviously furnishes no reason for waiving the requirement, it should alert the federal court to the possibility of attempts at circumvention. Thus one can appreciate the necessity of disqualifying habeas petitioners who have deliberately neglected to pursue state remedies to which it is now too late to return. But that is not a fair description of the petitioner in *Daniels*. He did not intentionally abandon his state remedies in order to accelerate a hearing in federal court; he was, after all, under a death sentence and stood to gain additional months of life by protracting his litigation. His sin—and not really his but his attorney's—was to serve the appeal papers by hand one day after the period for review as of right had expired. Making Daniels' predicament even more sympathetic is the fact that under local law his appeal would have been effective if the

[31] Reported *sub nom.* Brown v. Allen, 344 U.S. 443 (1953).

[32] 28 U.S.C. § 2254 (1964).

papers had been placed in the mail on the last day, though they would not have been received any sooner. Tested against the purposes ascribed to the exhaustion doctrine, *Daniels* imposed a sanction, forfeiture of habeas, all out of proportion to his procedural offense.

But there is another way of looking at the decision. The state court's dismissal of Daniels' appeal rested on a rule of state law which had nothing whatever to do with the merits or demerits of the federal claims. It has long been the practice of the Supreme Court to reject appeals from state courts when decision of the federal questions can have no effect on the outcome. "We do not attempt to settle the dispute," the Court has said, "where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character."[33] At the very least, this doctrine of independent nonfederal grounds is a rule of self-limitation. However, there are arguments to support the view that the doctrine is a constitutional restriction on the powers of the Court.[34] If the local rule of procedural default applied by the North Carolina court in *Daniels'* case was a tenable ground for sustaining the conviction despite the possibility of federal error in rulings of the trial court ("tenable" in this context is a term of art, discussed in some detail below),[35] review by appeal or certiorari in the Supreme Court was precluded. So in refusing habeas, the Court may have been ruling that the federal district courts cannot grant relief to a state prisoner who does not qualify for aid on direct review.[36] On this view, *Daniels* and *Brown v. Allen* are opposite sides of the same coin, for just as *Brown* broadened the writ of habeas corpus to a point coterminous with Supreme Court appellate review of questions of federal law, *Daniels* fastened onto the writ a limitation associated with direct review.

How limiting is that limitation? In order to foreclose review, the state ground must satisfy two requirements. The first is that it is genuinely independent of the merits of the federal issues. This is a matter of the state court's intention as revealed by its opinion. In a much sim-

[33] Fox Film Corp. v. Muller, 296 U.S. 207, 209-10 (1935).

[34] See Herb v. Pitcairn, 324 U.S. 117 (1945). Dissenting in Fay v. Noia, 372 U.S. at 463-66, Mr. Justice Harlan planted the doctrine squarely on Article III grounds.

[35] See text pp. 55-56.

[36] Although the general tenor of the opinion suggests that the foremost concern of the Court was interpretation of the exhaustion requirement, Mr. Justice Reed did say: "[A] United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed." Daniels v. Allen, *reported sub nom.* Brown v. Allen, 344 U.S. 443, 458 (1953).

plified way, it can be said that independent nonfederal grounds are presented in three types of opinions: (1) those in which the state court expressly refuses to consider the federal issues; (2) those wherein the federal points actually are decided in favor of a litigant who nevertheless loses his case on state grounds (in which event the federal-law rulings technically are dictum), and (3) opinions in which the federal as well as the state questions are resolved against a litigant, but the court's expressions concerning federal law are unnecessary to decision and constitute either obiter or alternative grounds. State courts, however, do not always compose their opinions in ways which make it easy for a federal court to determine the outcome-significance of the state grounds. Sometimes it may be a matter of arrière-pensée, but more often the simple truth is that the state judges have not sorted out in their own minds the relationship between the federal and state questions. That is especially likely to be the case when a party fails on both grounds, for whether the grounds are severable or interdependent —*i.e.*, whether situation (3) is presented—does not become critical until review is sought in a federal court.[37]

In addition to the requirement of independence, a state ground must qualify as "adequate" or "tenable" if it is to prevent federal court review. Whereas the severability of the state ground is itself a judgment belonging to the state court, the sufficiency of the ground is a question for the federal court. Were it otherwise, state courts could insulate their judgments from federal review by resort to, or invention of, local rules of the most tendentious kind. But there are as yet no clear standards of definition for "adequacy." A rule of state law which, standing alone or in application, offends the federal constitution obviously cannot constitute a sufficient nonfederal ground. In *Daniels v. Allen*, in fact, the Court skirmished over the constitutionality of the North Carolina court's refusal to exercise its discretion to entertain a slightly delayed appeal in a death-sentence case—"an act so arbitrary and so cruel in its operation," according to Justice Frankfurter in dissent, "that in the circumstances of this case it constitutes a denial of due process in its rudimentary procedural aspect."[38] But no one in

[37] An example is Irvin v. Dowd, 359 U.S. 394 (1959), where the state appellate court indicated that rejection of the prisoner's appeal was warranted by a rule of local law, but proceeded nevertheless to examine and reject the federal contentions on their merits. When the same contentions were renewed thereafter on federal habeas corpus, the Supreme Court divided sharply on characterization of the state ground.

[38] 344 U.S. 443, 557-58 (1953). Also casting the question in constitutional terms, a majority of the Court reached the opposite conclusion: "We cannot say that North Carolina's action in refusing to review after failure to perfect the case on appeal violates the federal constitution." *Id.* at 486 (per Reed, J.).

Daniels spoke to the question whether a state ruling which is not unconstitutional is eo ipso adequate.[39] However, one commentator has suggested that a state court may have constitutionally sufficient reasons for passing over federal claims which a federal court, for independent and constitutionally sufficient reasons of its own, should hear.[40] The immediate objection to this position is, of course, that disregard of the state ground undercuts what by hypothesis is legitimate state policy. To undercut, though, is not necessarily to destroy. In *Daniels*, for example, the loss of appeal to the highest state court is a serious sanction for tardiness and one which should effectively chasten future litigants even if the Supreme Court (or a habeas court) in the end is prepared to accept the case. Should anyone willfully seek to capitalize on differences between state and federal court ideas of reviewability, the federal court in that event can and should use its own devices to cope with such trifling. With respect to *Daniels*, then, the independent nonfederal ground doctrine no more justifies the disposition than did the Court's interpretation of the exhaustion requirement.

The equivalence of habeas and appeal, never a perfect 1:1 ratio since the collateral remedy offered superior factfinding possibilities,[41] was rejected altogether a mere decade after *Brown* and *Daniels*. In

[39] Nor was the question addressed by any member of the Court in Irvin v. Dowd, *supra* note 37, although Justice Brennan did say somewhat cryptically that "we do not reach the question whether federal habeas corpus would have been available to the petitioner had the Indiana Supreme Court rested its decision on the escape ground." 359 U.S. 394, 406.

[40] Hart, *supra* note 29, at 116 nn.94, 95.

[41] In form habeas corpus is an original civil action set in a trial court, which is empowered and equipped, as appellate tribunals are not, to receive the oral testimony of witnesses. Brown v. Allen established the authority of the federal habeas court to retry on independent proofs all relevant issues of fact, even though the same issues had previously been resolved in the state courts. However, only in "unusual circumstances" or upon discovery of a "vital flaw" in the state factfinding process was exercise of the power declared to be a mandatory duty of the habeas judge. 344 U.S. 443, 463-64, 506 (1953). The actions of the lower federal courts in the following decade evince no epidemic of "flaws" or "unusual circumstances," nor were the federal judges eager to relitigate questions of fact when refusal to do so would not have been reversible error. But see Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955), *cert. denied*, 350 U.S. 935 (1956).

The decision in Rogers v. Richmond, 365 U.S. 534 (1961), implied that flawed state factfinding in connection with a question of federal right was itself a denial of due process which required the prisoner's discharge on habeas, subject to corrective action in the state court. But Townsend v. Sain, 372 U.S. 293 (1963), restored (with detailed elaboration) the teaching of Brown v. Allen relative to the factfinding chore in the habeas court. The restoration proved short-lived, for in Jackson v. Denno, 378 U.S. 368 (1964), the Court once more seemed to equate inadequate state factfinding machinery with denial of due process. See Wright & Sofaer, "Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility," 75 Yale L.J. 895 (1966).

view of the repugnance of the *Daniels'* result, it is not surprising that the new point of departure was the nonfederal ground doctrine. The Court held in *Fay v. Noia*[42] that limitations on direct Supreme Court review occasioned by procedural default in the state courts do *not* "limit the power granted the federal courts under the federal habeas statute." The quintessential difference between habeas and appellate review, we are told, is that the former tests legality of detention "simpliciter" while the latter determines only the supportability of the judgment of the lower court. Consequently there are areas in which habeas and appeal do not coincide. Direct review may lie, though habeas will not, where the petitioner is not in custody.[43] Conversely, says *Noia*, habeas will lie where the applicant is held in violation of his federal rights, although the judgment which authorizes his imprisonment cannot be upset on direct review. Stringent rules of waiver or default, and even rules of inexcusable neglect, which are not normally considered harsh or excessive and which have counterparts in federal criminal procedure,[44] present no obstacle to the habeas remedy. Nothing less than "deliberate bypass" of the "orderly procedure of the state courts" must be shown (the burden being on the state) before the federal court can close its doors to a state prisoner. And even such a showing will not prevent the federal court from disregarding the bypass if it so wishes.

Doctrinally, *Noia* is a new broom which sweeps broadly, for although the relevance of the independent nonfederal ground to habeas had not been clearly articulated in *Daniels*, it had been taken for granted.[45] In strictly quantitative effect, however, *Noia* may not be as revolutionary as its holding would appear to indicate. The powers of the federal habeas court are enhanced only to the extent that rules

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[42] 372 U.S. 391, 399 (1963).

[43] *But cf.* Martin v. Virginia, 349 F.2d 781 (4th Cir. 1964), criticized in Note, 1966 Duke L.J. 588, but approved in Note, 26 Md. L. Rev. 79 (1966). Full service of sentence renders a case moot for purposes of direct as well as collateral review. Parker v. Ellis, 362 U.S. 574 (1960). Compare Fiswick v. United States, 329 U.S. 211 (1946).

[44] *E.g.*, Fed. R. Crim. P. 41(e) (requiring motion to suppress evidence to be brought before trial on pain of waiver of objection). See United States v. Nicholas, 319 F.2d 697 (2d Cir.) (alternate ground), *cert. denied*, 375 U.S. 933 (1963).

[45] See notes 36 and 37, *supra*. However, the language quoted from Irvin v. Dowd, *supra* note 39, could be understood as a portent of *Noia*. At least one commentator after *Irvin* urged rejection of the independent state ground doctrine in habeas cases. Reitz, "Federal Habeas Corpus: Impact of an Abortive State Proceeding," 74 Harv. L. Rev. 1315 (1961), and in a lecture delivered after *Irvin*, Mr. Justice Brennan expressed his own doubts as to the relevance of direct-review limitations to collateral proceedings, "Federal Habeas Corpus and State Prisoners: An Exercise in Federalism," 7 Utah L. Rev. 423, 435-36 (1961).

of state procedure do in fact preclude direct review in the Supreme Court, and while that is a matter of no little moment, its practical significance is to be measured by the readiness of the Court to accept the "adequacy" of the state procedural ground in a given case. There is reason to believe that the Court is considerably more sensitive nowadays to the matter of review limitation than it was at the time of *Daniels*. In *Noia* itself, for example, the Court was not prepared to say that the petitioner's failure to appeal his conviction to the state appellate court when he had the chance was a default grave enough to forestall review in the United States Supreme Court.[46] Although he did not elaborate on the point, Justice Brennan, the majority spokesman, could well have been wondering what worthwhile state interest was served by treating unappealed convictions as final, when another rule of state practice permitted unlimited reargument of cases previously disposed of by appeal as well as access to such local post-conviction remedies as coram nobis.[47] The latter rule refutes any claim that the former is based on considerations of economy of judicial effort or on an interest in detecting error soon enough to make retrial feasible. If anything, the provision for renewal of former appeals bespeaks a realization that the law can change over time and a desire to allow prisoners to take advantage of such changes. Where, therefore, a rule of procedure does not form part of an integrated, consistent state policy, it would not be farfetched—and it may be what Justice Brennan had in mind—to hold that the rule is not an adequate nonfederal ground.[48]

Nor is it enough for a state to demonstrate that its procedural

[46] 372 U.S. 391, 429: "[A] question on which we intimate no view." *But cf.* Parker v. Illinois, 333 U.S. 571 (1948); Sunal v. Large, 332 U.S. 174 (1947).

[47] Noia and two co-defendants had been convicted of murder by the New York court in 1942. The co-defendants appealed but Noia did not. Although the convictions were affirmed, one of the defendants ultimately procured his release on federal habeas corpus, United States *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955), after two unsuccessful motions for reargument of the original decision of the New York Court of Appeals, People v. Caminito, 297 N.Y. 882, 79 N.E.2d 277 (1948); 307 N.Y. 686, 120 N.E.2d 857 (1954). Thereafter the other co-defendant secured reversal of his conviction, by motion for reargument, People v. Bonino, 1 N.Y.2d 752, 152 N.Y.S.2d 298, 135 N.E.2d 51 (1956), despite an earlier failure on a similar motion, 296 N.Y. 1004, 73 N.E.2d 579 (1947). In Noia's case, however, the failure to appeal in the first instance was held to bar relief on coram nobis. People v. Noia, 3 Misc. 2d 447, 158 N.Y.S.2d 683 (Kings County 1956), *rev'd*, 4 App. Div. 2d 698, 163 N.Y.S.2d 798 (1957), *aff'd sub nom.* People v. Caminito, 3 N.Y.2d 596, 170 N.Y.S.2d 799, 148 N.E.2d 139, *cert. denied sub nom.* Noia v. New York, 357 U.S. 905 (1958).

[48] The New York court subsequently expanded coram nobis to accommodate claims founded on Jackson v. Denno, *supra* note 41. See People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965), recognized as an exhaustible state remedy, United States *ex rel.* Martin v. McMann, 348 F.2d 896 (2d Cir. 1965).

rule serves an intelligible and legitimate state policy in the abstract if a specific application is unwarranted. Thus in *Henry v. Mississippi*[49] the Court could find no fault with the state's contemporaneous objection requirement, under which an objection to the introduction of evidence was deemed waived unless interposed at the time the evidence was offered. But its own independent analysis of the record at trial led the Court to the tentative conclusion that the purposes of the state rule had been "substantially served," so that *as applied* by the Mississippi court the rule did not constitute an adequate nonfederal ground for sustaining the conviction.[50] That conclusion, as Justice Harlan demonstrated in his dissent, was based on some wobbly if not disingenuous logic.[51] But that is not the whole point. We could concede, though the majority of the Court did not, that every reason which supports the Mississippi waiver rule demanded its application in *Henry*, and still we might approve the Court's action. For even if Supreme Court review of the substantive federal issues necessarily and seriously impairs the efficacy of the state's contemporaneous objection requirement, there may be weightier countervailing interests of a federal character. Respect for state procedural doctrine is optional, not imperative, and has no bearing on the authority of federal courts to fashion their own rules for the protection of federal rights. A federally-fashioned waiver rule applicable to objections founded on federal law might strike a different balance than the Mississippi rule, even if the

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[49] 379 U.S. 443 (1965).

[50] The issue was held in abeyance pending determination on remand of the suggestion that defense counsel may purposefully have refrained from objecting for tactical reasons. If that proved to be the case, the constitutional claim would be forfeited, not only for purposes of direct Supreme Court review but also in a federal habeas proceeding unless the district judge chose, as a matter of grace, to overlook the "bypass."

[51] While the majority acknowledged that the Mississippi rule "clearly does serve a legitimate state interest," 379 U.S. at 448, the fact that the defendant had presented his search-and-seizure claim in a motion for directed verdict at the close of the state's case in chief was viewed as a sufficient substitute for contemporaneous objection. However, Justice Harlan showed that the constitutional claim—which was by no means self-evident—was buried in the directed verdict motion and was not argued orally; thus there was lacking the focused attention which contemporaneous objection assures. One might add another criticism of the majority decision, viz., that an immediate objection permits the admissibility of testimony to be determined before the jury hears the witness' response. An after-the-fact motion is not truly curative; indeed a jury's mere exposure to unconstitutional evidence can offend due process. Jackson v. Denno, 378 U.S. 368 (1964). Unless the Court in *Henry* meant to apply the concept of harmless error to evidence obtained in violation of the fourth amendment—and the Court expressly reserved that question, 379 U.S. at 449 n.6—it is hard to perceive how a motion to strike or a cautionary instruction to the jury can undo the harm caused by failure to interpose an anticipatory objection.

latter is not, under latitudinarian standards of due process, "unreasonable."

As Justice Harlan showed, enforcement of the state contemporaneous objection rule in *Henry* was rationally calculated to promote some undeniably desirable objectives. The first and most important reason for the rule is to avoid needless appeals and retrials by insisting that the judge presiding at the original trial be given a fair opportunity to exclude improper evidence before it infects the proceedings (to say nothing of affording the prosecutor the chance to withdraw the challenged evidence). A secondary but not insignificant purpose is to secure for the reviewing court the benefit of the trial judge's explanation should the objection be overruled.[52] The intended effect of such a rule of waiver, rigorously enforced, is not so much punitive as prophylactic; the expectation being that attorneys in future cases will neither intentionally nor inadvertently invite error by failing to raise their objections promptly. In this manner Mississippi made the judgment that the ends of justice in the generality of cases are best served by its waiver-of-objection rule.

However, a different set of considerations supports a much less rigorous rule. The first premise might be that even competent attorneys sometimes make honest and inadvertent mistakes, and that notice of adverse consequences does not insure against negligent or accidental omissions. Then apart from the question of deterrent effectiveness, there is a question of elementary fairness to the defendant. Is it right to charge a lawyer's oversight to his client when the consequence for the client is imprisonment or even death, while for the lawyer it is merely remorse? Moreover in some cases the improper admission of evidence so prejudices the process of guilt determination as to render the total trial unfair.[53] The right of fair trial is hardly something that should be forfeited inadvertently or waived by proxy. Even for constitutional errors of lesser gravity, the public interests served by correction of the error can, on a national value scale, be deemed superior to the interests which are served by an airtight waiver doctrine.[54] From

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[52] It cannot be denied that trial judges (inspired perhaps by Lord Mansfield's famous advice) ordinarily do not explain their rulings on objections to evidence. But where the objection is founded on the Constitution, the compulsion to explain is greater. *Cf.* Townsend v. Sain, 372 U.S. 293 (1963).

[53] The admission of coerced confessions is held to have that effect. Lynumn v. Illinois, 372 U.S. 528 (1963); Payne v. Arkansas, 356 U.S. 560 (1958); Malinski v. New York, 324 U.S. 401 (1945).

[54] Thus a finding of illegal search and seizure serves to vindicate the right of privacy and to deter future unlawful intrusions, even if the use of the evidence was in nowise unfair to the defendant. *But cf.* Linkletter v. Walker, 381 U.S. 618 (1965).

the foregoing elements it is possible to construct an independent federal doctrine of waiver quite different from that on which Mr. Henry came a cropper in the state courts. It could take several forms, including at the outer extreme an absolute principle that federal objections are unwaivable. If the Court's disposition in *Henry* is any indication, however, some *intentional* waivers will be accepted and treated as irreversible.[55] What constitutes "intent," whose intention is relevant: the lawyer's or the client's, and where the burden of proving waiver lies are matters of further refinement on which *Henry* offers some additional, though not definitive, advice.

In a more recent case the Court said: "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."[56] So unexceptional was the proposition thought to be that the words "of course" were used. Had the same proposition been the starting point for decision in *Henry*, or in *Noia*, much of the present brouhaha about the powers of federal reviewing courts might have been avoided. Unhappily, even members of the Supreme Court are not free from the tyranny of words. The phrase "adequate nonfederal ground" directs the mind along the path of timidity and deference to local jurisprudence, and where sound instincts rebel the result is likely to be a neurotic reaction. Perhaps this may be the explanation for the majority opinion in *Henry*. At any rate, we can agree with Justice Harlan that direct Supreme Court review seems to have been liberated from state procedural constraints almost, if not wholly, to the same degree as federal habeas corpus. Which is to say that the *Brown-Daniels v. Allen* equation between the two forms of review still has validity, albeit on a scale of mutual enlargement.

III. The Obligation of the States to Hear Federal Claims

If, as the Court now seems to recognize, there is a federal power to prescribe the conditions for waiver of federal rights, should not the power be exercised pre-emptively? It is intensely uncomfortable—and this is the point of the dissent in *Henry v. Mississippi*—to disregard for purposes of federal court review a state procedural system which is "legitimate" enough to continue functioning in the state courts. Those states with stricter requirements of procedure might, it is true, be induced to change their ways by the knowledge that failure to do so will not bar federal court review and in fact will hasten it. But that is not reform by example; it is reform by blackmail, and it is not, as

[55] See note 50, *supra*.

[56] Brookhart v. Janis, 384 U.S. 1, 4 (1966).

Justice Harlan said, "congenial to the kind of federalism I had supposed was ours."[57]

Ultimately the Court will have to answer this question: Are the reasons which impel federal courts to entertain constitutional claims despite the defendant's failure to raise a prompt objection (as in *Henry*) or to pursue a timely appeal (as in *Daniels* and *Noia*) reasons which are rooted in due process, or are they only reactions of a more sensitive federal conscience? If the former, the states violate the fourteenth amendment when they refuse to hear claims which the Supreme Court or federal habeas judges will entertain, and the remedy for that violation is to set aside the defendant's conviction instanter and without regard to the merit of the claims that were unjustifiably forfeited.

It is a recognized principle that the states have a constitutional duty to adjudicate federal questions when *Congress* commands.[58] It is also true that in the enforcement of federal statutory rights the states may be obliged to subordinate their own procedures to the practices of federal courts.[59] Can we not deduce from these principles a requirement that the state courts rule on constitutional questions arising out of or in the course of criminal proceedings, and that they do so in compliance with procedural ground rules set by the Supreme Court? The authority to establish procedural conditions for the adjudication of federal claims is, it would appear, a corollary of the Court's authority to define rights under the fourteenth amendment.

The Supreme Court's confession cases are instructive in this connection. First it was held that the fourteenth amendment prohibits the use of coerced confessions as evidence of guilt.[60] This exclusionary rule soon was reinforced by decisions holding that introduction of an involuntary confession cannot be condoned as harmless error, whatever may be the sufficiency of other proofs of guilt.[61] Then after three decades of confession cases, the Court held in *Jackson v. Denno*[62] that the fourteenth amendment requires a full determination of all questions of law and fact relating to voluntariness before a confession can be submitted to a trial jury. Each of these rulings was derived from the due process clause, each was "procedural" in one sense or another, and in each instance the question before the Court was not whether the state judges had acted arbitrarily but whether they had done as much as they should to protect the defendant's underlying right to be free

[57] Henry v. Mississippi, 379 U.S. 443, 465 (1965) (dissenting opinion).

[58] Testa v. Katt, 330 U.S. 386 (1947).

[59] Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952).

[60] Brown v. Mississippi, 297 U.S. 278 (1936).

[61] Chambers v. Florida, 309 U.S. 227 (1940), and cases cited in note 53, *supra*.

[62] 378 U.S. 368 (1964).

from police brutality or duress.[63] Would it be an unnatural progression from these rulings to forbid the state courts to forfeit a defendant's constitutional claims, except perhaps when he has wantonly and deliberately abused fair rules of orderly procedure?

Of course, a "federalization" of state procedures under the authority of the fourteenth amendment need not go this far. There is a qualitative difference between a state remedial system which will hear a constitutional claim provided only that the party asserting the claim complies with reasonable rules of legal procedure and a state regime which fails to provide any process at all. The affirmative obligation to supply process was the issue on which certiorari was granted in *Case v. Nebraska*,[64] in the same term of Court that produced *Henry v. Mississippi*. But before the case was argued the Nebraska legislature enacted a new post-conviction remedy statute,[65] causing the Court, on grounds of probable mootness, to withhold decision. The statutory reform was warmly applauded in separate opinions by Justices Clark and Brennan as a step in the direction of harmonious federal-state relations. It would be unfair, however, to suppose that the Justices were telegraphing their punches on the constitutional issue. Nor, as we have suggested, would a decision adverse to the state necessarily have meant the end of state rules of waiver or forfeiture of federal claims less permissive than the rules governing Supreme Court review or federal habeas corpus.

Johnson v. New Jersey,[66] decided only last June, discourages prediction of the hasty demise of local waiver doctrine. The defendant sought Supreme Court review of collateral state proceedings, asserting alternative claims: first, that the rulings in *Escobedo*[67] and *Miranda*[68] should be applied retrospectively to void his conviction, and second, that even under the pre-*Escobedo* standard of voluntariness his confession should not have been admitted in evidence. After rejecting the first claim on the merits and announcing that the new rules for police interrogation were to be applied prospectively, the Court refused to consider the second. The coerced confession claim had been rejected in previous state post-conviction proceedings as well as in a federal habeas hearing. The defendant then had renewed the claim in the state court, asserting additional facts never alleged in any of the earlier proceedings. Invoking a rule of state procedure, the state refused to

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63 Compare Mapp v. Ohio, 367 U.S. 643 (1961).

64 381 U.S. 336 (1965).

65 Neb. Laws ch. 145, § 1 (1965).

66 384 U.S. 719 (1966).

67 Escobedo v. Illinois, 378 U.S. 478 (1964).

68 Miranda v. Arizona, 384 U.S. 436 (1966).

consider the new allegations. It was in this posture that the matter reached the Supreme Court. The decision of the state court was held to rest on "an adequate state ground which precludes us from testing the coerced confession claim on the present review, whatever may be the significance of the state court's reliance on its procedural rule in federal habeas corpus proceedings."[69]

If *Fay v. Noia* would compel a federal court to hear the claim on habeas, *Johnson* indeed is a most disquieting case. For it would mean not only that federal habeas practice does not set the standards of procedural due process in the state courts, but also that direct Supreme Court review of state criminal judgments *is* shut off by "reasonable" local rules of procedure—the implications of *Henry v. Mississippi* to the contrary notwithstanding. It is hard to believe that *Johnson* indicates such a total regression. Not even a habeas court is obliged to act on repetitious or vexatious petitions or to "sanction needless piecemeal presentation of constitutional claims,"[70] and while there was no specific proof of bad faith, the Court may perhaps have had cause for suspicion.[71] In any event, that is a question of fact which is just as unsuitable for determination by the Supreme Court as was the suggestion of tactical failure to object in *Henry*. Nor should too much significance be given to the Court's failure to remand *Johnson* to the state court for proof that the petitioner deliberately hoarded his contention, as it did in *Henry*, for it was the *Escobedo* and *Miranda* retroactivity question and not the *Henry-Noia* problem that demanded and received the Court's primary attention.[72]

It is still too soon to say with any assurance that the Court will or will not tolerate a double standard of procedure for the presentation of constitutional claims. Perhaps the lower federal courts need more time to digest and decrassify the "deliberate bypass" doctrine for

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[69] 384 U.S. 719, 735-36 (1966).

[70] Townsend v. Sain, 372 U.S. 293, 317 (1963).

[71] Not until *Escobedo* was decided did the petitioner allege denial of access to counsel and relatives. These plainly were not newly-discovered facts, although it is conceivable that petitioner was unaware of their legal significance before *Escobedo*. Even so, his subsequent post-conviction petition may not have asserted a new "ground" as the term is defined for federal remedies. See Sanders v. United States, 373 U.S. 1, 16 (1963). If a federal habeas court could properly have dismissed the follow-up petition without further inquiry, New Jersey procedure is not comparatively more restrictive.

[72] Note also that in *Henry* the defendant's sentence apparently was stayed pending direct review. For the Supreme Court to have dismissed certiorari and remitted the petitioner to his habeas remedy would have required that he go to jail as a condition of further litigating. But see Martin v. Virginia, *supra* note 43. In *Johnson*, the defendant already was in prison and was seeking Supreme Court review of collateral state proceedings, so that the need for such review in preference to habeas was emotionally less impelling.

habeas cases and to work out its implications for *federal* criminal procedure before it can be decided whether to transfer the doctrine bodily to the states. Perhaps too the Court is waiting for the states to respond to the invitation to procedural relaxation which it issued in *Case v. Nebraska*.[73] Meanwhile, however, federal habeas, and in some instances Supreme Court appellate review of state decisions, offers many aggrieved state prisoners the only remedy they will find.

IV. The Implications of Habeas for State Justice

The history of federal habeas corpus in the last decade is a history of enlargement. Today it is not inaccurate to say that virtually every state criminal conviction which results in imprisonment and which involves an allegation of constitutional infraction is reviewable in the lower federal courts. Were the motive force behind the expansion of habeas to its present proportions a skeptical opinion of the quality of justice being dispensed in the state courts, the state judges would have good reason for resentment and indignation. But it is difficult to believe that modern habeas practice can be explained on no other assumption. Unfortunately the Court has yet fully to articulate the bases for its expansive interpretations of the Habeas Corpus Act.

In seeking to develop justifications, it is helpful to distinguish two categories of cases in which federal court review is made available to state prisoners. The first is exemplified by *Brown v. Allen*. There the lower federal courts were directed to re-do what the highest state court had already done, *i.e.*, to determine the merit of the petitioner's federal claims. This is habeas in its most controversial form, for the district judge serves as nothing less than a one-man Supreme Court reviewing the decisions of the highest state appellate tribunal. The case against *Brown v. Allen* has been developed most fully by Professor Bator.[74] He argues that the right of the Supreme Court to rule on the correctness of a state court's application of federal law is not in the nature of things delegable to an inferior federal court. The Supreme Court's pronouncement constitutes a "correct" statement of constitutional law only because the Court *is* supreme: no other tribunal sits in review of its decisions.[75] A court of last resort is not by hypothesis superior in ability

[73] See Brennan, "Some Aspects of Federalism," 39 N.Y.U.L. Rev. 945, 957-58 (1964); Meador, "Accommodating State Criminal Procedure and Federal Postconviction Review," 50 A.B.A.J. 928 (1964).

[74] Bator, *supra* note 24.

[75] Writing for himself in Brown v. Allen, Mr. Justice Jackson said: "[R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we

or integrity, but superior only in authority. "Error" accordingly is a deviation from authoritative decisions of the highest court in the hierarchy of courts. Beyond producing *uniformity* in the decision of like cases, there is nothing intrinsic to a system of judicial review which assures *correct* decision in any ideal sense—a truth of which we are reminded each time a precedent is overruled.[76]

Thus it is argued that habeas review is not and cannot be a practical substitute for direct review by certiorari or appeal, simply because *lower* federal courts can offer no further assurance of correct decision either in the ideal sense or in terms of conformity to authoritative Supreme Court pronouncements.[77] In cases like *Brown v. Allen*, Bator maintains, there is as much chance that the federal habeas judge will be wrong in his understanding of the law as there is that the state supreme court erred in its interpretation. Only if it were assumed that state courts, including the state appellate bench, are generally less faithful in their adherence to or less competent in their understanding of controlling federal law than are the lower federal judges would *Brown* make sense to that commentator. In other words, only a higher quotient of error (defined as deviation from authoritative Supreme Court pronouncements) in the state courts logically could justify relitigation in the federal district court. This, of course, is the assumption which incenses the state judiciary: first, because it demands documentation and the experience since *Brown* has not revealed so significant an incidence of release of state prisoners on habeas as to substantiate doubts concerning the probity or integrity of state judges;[78] second, because such an assumption runs counter to the original scheme of the

are infallible only because we are final." 344 U.S. 443, 540 (concurring opinion). 137 years earlier, Justice Story had written: "From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 345 (1816).

[76] The Court's recent resort to the technique of prospective overruling—see Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. United States *ex. rel.* Shott, 382 U.S. 406 (1966); Johnson v. New Jersey, 384 U.S. 719 (1966)—bespeaks not only the belief that higher courts for better or worse "make" law, but the uneasy concern that retrospective change, given the indefinite availability of habeas corpus, can have extravagant and untoward consequences. Compare the alternative of modifying customary habeas practice, put forward by Mishkin, "The High Court, the Great Writ, and the Due Process of Time and Law," 79 Harv. L. Rev. 56 (1965).

[77] Lower federal court rulings on points of constitutional law, needless to say, are often reversed by the Supreme Court. This is no less true of the federal courts in their habeas capacity. See, *e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961), *reversing* 271 F.2d 552 (7th Cir. 1959); Leyra v. Denno, 347 U.S. 566 (1954), *reversing* 208 F.2d 605 (2d Cir. 1953).

[78] Mr. Justice Clark places the figure for successful petitions between 1946 and 1957 at 1.4%. Fay v. Noia, 372 U.S. 391, 445 n.1 (1963) (dissenting opinion).

Constitution which created only one indestructible federal court, the Supreme Court, and perforce left open the possibility that the states would play a largely autonomous role in the protection of federal rights;[79] third, because despite *Brown v. Allen*, it is far from settled that the decision of a question of federal law by a United States court of appeals, much less a district court, constitutes a precedent binding on the state courts within the same territorial jurisdiction;[80] and finally, because the logical terminus of a belief that state judges are more error-prone than federal judges is that the trial of defendants having federal claims to present should be transferred to the federal courts in the first place rather than re-opened after conviction—a position, however, which the Court has rejected.[81]

But reinquiry by habeas can be justified by considerations which do not demean the state courts. Louis Jaffe has observed that "when we want extra assurance we should not forfeit it for doctrinal purity."[82] Bator's doctrinal purity might demand that decisions reached by the state courts in fair hearings be accepted as final, absent review in the Supreme Court. Extra assurance, however, suggests that still another court take a look at the merit of defendant's claims.[83] Even Professor Bator admits that appellate review somehow does promote justice as well as performing the neutral service of unifying the law;[84] surely as much can be said for collateral review. The most serious objection concerns the cost of additional proceedings. The habeas jurisdiction does require an enormous commitment of federal judicial resources, to say nothing of the heavy burdens it imposes on state prosecuting authorities, for what seems a marginal profit in terms of wrongs set right.[85] But if the continued imprisonment of a single defendant in violation of his constitutional rights is "intolerable," as the Court in *Fay v. Noia* said it was, then habeas needs no cost justification.

There is a second category of habeas claim which involves different and perhaps more compelling reasons for inquiry by the federal

79 U.S. Const. art. III, § 1. The debated alternatives are reported in Padover, To Secure These Blessings 399-401 (1962). *Cf.* Hart, "The Relations Between State and Federal Law," 54 Colum. L. Rev. 489, 507 (1954).

80 See Annot., 147 A.L.R. 857 (1943).

81 City of Greenwood v. Peacock, 384 U.S. 808 (1966).

82 Jaffe, Judicial Control of Administrative Action 635 (1965). The quoted statement refers to the closely analogous situation of de novo judicial review of administrative agency findings of "jurisdictional facts."

83 Consider California's provision for automatic appeal in death-sentence cases, Cal. Pen. Code § 1239(b) (1956).

84 Bator, *supra* note 24, at 453, 473.

85 See Note, "The Burden of Federal Habeas Corpus Petitions from State Prisoners," 52 Va. L. Rev. 486 (1966).

courts. Many of the decisions discussed in this article, such as *Daniels v. Allen*, *Fay v. Noia*, *Case v. Nebraska*, were cases in which the state courts declined to consider a defendant's constitutional arguments for procedural reasons. A federal hearing in these instances is not the kind of repetitious litigation that Professor Bator finds offensive, and yet it is here that the probability is greatest that the state prisoner will win his release by the order of a federal judge. What is responsible, however, is the lesser willingness, not the lesser ability, of the state judges to decide federal questions. Should the fourteenth amendment be construed as imposing on the state courts an obligation to entertain a prisoner's federal constitutional claims whenever such claims would be cognizable on habeas, it would amount to a vote of confidence in the ability of the state judges to render reliable decisions. Habeas, to be sure, would remain open as an "extra assurance" warranted by the importance of the constitutional rights in question; but the federal remedy would truly be a supplement, not a reproach, to state justice.